Courts Mistakenly Cross-Out Memorials: Why the Establishment Clause is Not Violated by Roadside Crosses

Elizabeth A. Murphy

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NOTE

COURTS MISTAKENLY CROSS-OUT MEMORIALS: WHY THE ESTABLISHMENT CLAUSE IS NOT VIOLATED BY ROADSIDE CROSSES

I. INTRODUCTION

Mollie Mishoe lost her husband in a fatal car accident on August 3, 2007, a few months before their fiftieth wedding anniversary. For Mollie and her children, the grieving process included erecting two roadside crosses at the site of the accident, to memorialize their beloved husband and father, Bill Mishoe. This location was the last spot Bill was alive, and the cross memorial is a place the family goes to remember and feel close to him again. The Mishoes have become spiritually connected to the site of the accident, and to the cross memorial they have placed there. This is the place where they can still feel Bill’s presence—a place where they can heal. For them, this memorial has become “sacred[,] but not necessarily religious.”

The Mishoes have maintained this memorial for three and a half years, “trim[ming] the weeds around the crosses, and chang[ing] out the wreath and flowers on them.” In February 2011, the Mishoes learned

2. Id.
3. Id.; see also Ian Urbina, As Roadside Memorials Multiply, a Second Look, N.Y. TIMES, Feb. 6, 2006, at A1 (explaining that a mother visits her daughter’s roadside memorial weekly because it “is where [her] . . . spirit was last”).
5. See id.; Stepzinski, supra note 1.
7. Stepzinski, supra note 1.
that their cross memorial is in danger of being removed. The Georgia Department of Transportation plans to remove all current roadside memorials, and replace them with a temporary oval sign that will remain standing for one year. In an instant, the Mishoes will lose that sacred place where they go to grieve the loss of their loved one.

Many families all over the world face the same problem. These families erect a cross in memory of a deceased loved one, and upon visiting it one day, learn that the government or another private party has dismantled it. In the United States, roadside cross memorials usually face removal by the government because they are deemed to violate the First Amendment of the U.S. Constitution. Even though these crosses are created and maintained by a private party, not by the government, they are removed because some believe their existence is a sign that the federal government is endorsing the Christian religion.

The First Amendment to the U.S. Constitution states, "Congress shall make no law respecting an establishment of religion." This rule, known as the Establishment Clause, causes much confusion when applied to religious symbols erected on public property. The U.S. Supreme Court has issued a definitive ruling that any monument erected on public land constitutes government speech, even if there is private funding for the monument. This subjects all privately donated monuments erected on public land to scrutiny under the Establishment Clause.

The courts have had a difficult time articulating when a religious symbol erected on public land violates the Establishment Clause. This is because Establishment Clause jurisprudence is controlled by the slightest differences in each case, leading to a fact-specific inquiry. This has resulted in the use of a variety of tests in evaluating Establishment Clause challenges, yet the U.S. Supreme Court has never

8. Id.
9. Id.
10. See id.
11. Am. Atheists, Inc. v. Duncan, 616 F.3d 1145, 1164 (10th Cir. 2010).
12. See id. at 1160.
16. Id.
17. See LEVY, supra note 14, at 220-21.
18. See Murray v. City of Austin, 947 F.2d 147, 156 (5th Cir. 1991).
held one of these tests to be the definitive rule of law. In a recent case, American Atheists, Inc. v. Duncan, the Tenth Circuit held that crosses erected along a highway in memory of fallen highway patrol officers violated the Establishment Clause because a reasonable observer could view these crosses as endorsing the Christian religion. Even though Establishment Clause jurisprudence is inconsistent, this Note examines why crosses, when used specifically as roadside memorials, do not violate the Establishment Clause.

Part II of this Note provides a brief overview of the history of the Establishment Clause, highlighting why it is difficult for the courts to interpret this rule. Part III examines the tests applied in previous Establishment Clause cases. Part IV discusses the overall approach the courts have taken towards public displays of crosses in general. Part V discusses why crosses, when used as roadside memorials, do not violate the Establishment Clause. Part VI proposes the adoption of a bright line test that crosses, only when used as roadside memorials, do not violate the Establishment Clause.

II. THE AMBIGUITY OF THE ESTABLISHMENT CLAUSE

The courts have struggled with how to interpret the Establishment Clause. This is because the language of the First Amendment is broad and the Framers of the Constitution “never stated in a clear and unanimous voice their precise intention behind” it. The legislative history surrounding this rule is scarce and does not explain the Framers’ purpose behind the existence of this rule. Most of the recorded debates that occurred during the drafting of the Establishment Clause state that different people had different intentions for this rule; there was no unity behind what goal this rule was intended to accomplish.

The House had a special committee that analyzed the proposed amendments to the Constitution. The report this committee submitted to the House suggested that the original language of the Establishment

19. See LEVY, supra note 14, at 221-22 (finding that the court has been “erratic and unprincipled in its decisions” and uses many different tests to analyze Establishment Clause violations).
20. 616 F.3d 1145 (10th Cir. 2010).
21. Id. at 1160.
22. See LEVY, supra note 14, at 220.
24. See LEVY, supra note 14, at 96, 105.
26. LEVY, supra note 14, at 96.
Clause be redrafted. The amendment proposed by James Madison to this committee first stated "nor shall any national religion be established." The committee suggested the removal of the word "national," but failed to provide an explanation for this change. Furthermore, to add to the confusion surrounding this rule, the debate of the House on the amendment took only one day, and "[a]mbiguity, brevity, and imprecision...characterize the comments of the few members who spoke."

The only slight piece of insight into whether the interpretation of the Establishment Clause should be narrow or broad are the events that took place during the drafting of the amendment. The Senate drafted a narrower version that would only forbid the establishment of a single national church. However, the House rejected this version, favoring the broadly constructed current version. To persuade the House to compromise with it on the wording of several other amendments, the Senate agreed to the broader formulation. While this piece of history may provide a look into the thoughts of the Framers in enacting the Establishment Clause, it does not provide us with clear evidence that the intent was for a broad interpretation. All that can be inferred from this information is that the House rejected a very narrow interpretation of this Clause and that the Senate acquiesced to the demand in exchange for getting its way in regard to other amendments. This ambiguity in the formation of the Establishment Clause leads to much confusion in Establishment Clause jurisprudence.

III. TESTS USED FOR ESTABLISHMENT CLAUSE CHALLENGES

The U.S. Supreme Court has decided a multitude of cases concerning challenges to the Establishment Clause. The Court has utilized various tests in analyzing these challenges. However, it has never declared any of these to be the definitive test that would govern

27. Id.
28. Id. at 94-95.
29. Id. at 96.
30. See 1 ANNALS OF CONG. 757-59 (1789) (Joseph Gales ed., 1834).
31. LEVY, supra note 14, at 99.
32. See id. at 102-04.
33. See id. at 102-03.
34. See id. at 103-04.
35. See S. Journal, 1st Cong., 1st Sess. 87 (1789); LEVY, supra note 14, at 104.
36. See LEVY, supra note 14, at 105.
37. See id. at 104.
38. See id. at 105.
39. See id. at 220-21.
every Establishment Clause challenge. The following is a description of some of the tests the Court has applied.

A. The Lemon Test

In *Lemon v. Kurtzman*, the U.S. Supreme Court examined statutes enacted in Pennsylvania and Rhode Island that allowed these states to provide aid to nonpublic schools, the majority of which were Catholic schools. In deciding this challenge to the Establishment Clause, the Court laid out a test to be used for claims of Establishment Clause violations involving statutes. The statute at issue “must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion . . . [and third, it] must not foster ‘an excessive government entanglement with religion.’” This test grew out of the theory that “the establishment clause [sic] existed to create a secular state and that under the First Amendment nonreligion was just as important as religion.” While this may have been the first attempt at defining a controlling test for determining Establishment Clause violations, the Court has never held it to be the decisive test for all Establishment Clause cases. Rather, these factors are seen by the Court as “‘no more than helpful signposts.’”

**Notes:**


41. 403 U.S. 602 (1971).

42. *Id.* at 607-10.


44. *Id.* (citation omitted).


46. The Court has often looked to other tests to aid in deciding if a violation of the Establishment Clause exists. *See, e.g.*, Van Orden v. Perry, 545 U.S. 677, 686 (2005) (declining to use the Lemon test because looking at the history of the monument would be more helpful in that situation); Zelman v. Simmons-Harris, 536 U.S. 639, 652 (2002) (choosing to use a Neutrality test as opposed to the Lemon test in determining if aid to nonpublic schools violated the Establishment Clause); Marsh v. Chambers, 463 U.S. 783, 786, 792 (1983) (finding it was constitutional to allow a chaplain to open legislative sessions with a prayer despite the fact that the Court of Appeals determined that this action would be unconstitutional if evaluated under Lemon).

47. *Van Orden*, 545 U.S. at 686 (citation omitted) (stating that the Lemon test is not helpful enough in analyzing Establishment Clause cases).
B. Justice O'Connor's "Endorsement Test"

In *Lynch v. Donnelly*, the Court examined a Christmas display composed of not only various secular items but also a crèche. In her concurrence, Justice O'Connor expanded the meaning of the *Lemon* test into what is now known as the Endorsement test. She suggested that in using the purpose and effect prongs, the Court must look at the message the government intends to communicate as well as the message actually communicated. This dual examination is critical because the message perceived by the audience is not always the intended message. Thus, the "proper inquiry . . . is whether the government intends to convey a message of endorsement or disapproval of religion[,]" in addition to whether any "[e]ndorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community."

Justice O'Connor stated in her *Lynch* concurrence that the Court must concentrate on the objective message perceived by the community. However, at that time, she did not discuss how to judge this perceived message, leaving only a vague description of the Endorsement test that required analyzing how the community, the possible outsiders, would view the action at issue.

In *Wallace v. Jaffree*, Justice O'Connor expanded this notion, stating that "[t]he relevant issue is whether an objective observer, acquainted with the text, legislative history, and implementation of the statute, would perceive it as a state endorsement." Facing criticism over what amount of knowledge a reasonable observer should have regarding the display, this concept has evolved, and the display is now analyzed from the viewpoint of a "reasonable, informed observer."
The reasonable observer is not a bystander, casually passing by the display one day. Rather, the reasonable observer is aware of the religious display's essential history, its context, and its location. The reasonable observer is also aware of who owns the land on which the display rests. This observer is a rational being who will consider his or her knowledge of the display before rendering a neutral decision on whether the display violates the Establishment Clause in the context in which it is being used. The reason for this is that anyone could possibly perceive any display to endorse religion if he or she does not know the reason it was erected. This would create a broad, overreaching analysis of the Establishment Clause and would “require [the] invalidation of a government practice merely because it in fact causes . . . advancement or inhibition of religion.” Requiring the reasonable observer to be informed to some extent strikes a balance between an interpretation of the Establishment Clause that is either too narrow or too broad.

There are, however, some pitfalls to the Endorsement test. The courts have had differing opinions with regard to religious displays, basing their decisions on factors such as the religious symbol's location or whether it is surrounded by secular symbols. Different facts result in different conclusions. Furthermore, the Endorsement test

60. See id. at 780-81.
61. Id.
63. See Pinette, 515 U.S. at 779-81.
64. See id. at 780.
66. See Pinette, 515 U.S. at 780.
67. See Am. Atheists, Inc. v. Duncan, 616 F.3d 1145, 1160 n.13 (10th Cir. 2010) (suggesting that the endorsement of Christianity is even stronger because two of the crosses at issue were located immediately outside the Highway Patrol office); see also Van Orden v. Perry, 545 U.S. 677, 701 (2005) (Breyer, J., concurring) (stating that “the display’s placement on the capitol grounds . . . suggest that the State itself intended the . . . nonreligious aspects of the tablets’ message to predominate”); Cnty. of Allegheny v. ACLU, 492 U.S. 573, 599-600 (1989) (finding that because the crèche at issue sat on the grand staircase of the courthouse, “[n]o viewer could reasonably think that it occupies the[ ] location without the support and approval of the government”).
68. See Lynch, 465 U.S. at 692 (O’Connor, J., concurring) (finding that a crèche included in a Christmas display did not have a primary message of endorsing Christianity because it was surrounded by other secular symbols); see also Van Orden, 545 U.S. at 702 (suggesting that because the Ten Commandments monument at issue was surrounded by other monuments and historical markers, it primarily conveyed a secular message); Duncan, 616 F.3d at 1159-60 (concluding that the crosses at issue conveyed a primarily sectarian message because there were no “contextual or historical elements that served to secularize the message conveyed by such a display”).
depends on the reasonable observer, who could fluctuate between two extremes when looking at the perceived message. The observer can either be too sensitive in believing that the display endorses religion, or overly insensitive in not seeing the potential conveyance of a government message endorsing religion. Since the Endorsement test does not give guidance on which perception should be afforded more weight, the jurisprudence under this rule is "fraught with futility."

C. The Neutrality Test

The U.S. Supreme Court has sometimes utilized the Neutrality test to analyze various Establishment Clause challenges. In Zelman v. Simmons-Harris, the Court held that a government program providing direct tuition aid to families did not violate the Establishment Clause, despite the fact that the aid went almost entirely to parochial schools and not one public school elected to partake in the program. In articulating its decision, the Court regarded neutrality as the key aspect of this program. It stated that a program is neutral and does not violate the Establishment Clause if it "provides assistance directly to a broad class of citizens who, in turn, direct government aid to religious schools wholly as a result of their own genuine and independent private choice." In McCready County v. ACLU, the companion case to Van Orden v. Perry, the Court extended the neutrality principle to a public display case. The Court reiterated the importance of the Lemon purpose prong and treated the hallmark question of Establishment Clause inquiries as whether the government is remaining neutral between different religious systems, as well as between religion and nonreligion.

70. Pinette, 515 U.S. at 773.
71. See Van Orden, 545 U.S. at 696-97 (Thomas, J., concurring) (reflecting the two opposite viewpoints when it comes to Establishment Clause challenges).
72. See id.
73. Id. at 697.
75. 536 U.S. 639 (2002).
76. Id. at 645, 647, 662-63.
77. Id. at 662.
78. Id. at 652.
80. 545 U.S. 677 (2005).
81. See McCready Cnty., 545 U.S. at 881.
82. See id. at 871, 873, 875-76, 881.
D. The Coercion Test

In his concurrence in \textit{Van Orden}, Justice Thomas suggested that adopting a Coercion test for Establishment Clause inquiries would evince some sort of consistency in Establishment Clause jurisprudence. The Court does not have to judge the religiousness of the symbol, but rather only has to look at whether it forces a person to engage in religious behavior. The hallmark of this test is whether there exists "actual legal coercion." This legal coercion involves "coercion of religious orthodoxy and of financial support by force of law and threat of penalty." If the monument is passive, not mandating a person to observe a specific religion, or for that matter, even to look at it, there is no coercion. If a person can simply choose to turn his or her back and walk away from the symbol, it does not violate the Establishment Clause.

Justice Thomas advocated this test because it does not detract from the religious significance of these symbols. It allows the display to retain its significance but also allows it to remain standing as long as the public is not forced to worship a specific religion. Additionally, this test prevents a broad interpretation of the Establishment Clause, under which all religious symbols are invalidated merely because an overly-sensitive person may be uncomfortable with a public display of a religious symbol. Under the Coercion test, a religious symbol is invalid only if it exerts the type of coercion that interferes with "religious liberty."

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83. \textit{See Van Orden}, 545 U.S. at 697 (Thomas, J., concurring). This concept was first defined in \textit{Lee v. Weisman}, in which the Court found that Rhode Island's "practice of including invocations and benedictions in public school graduations violated the Establishment Clause." 505 U.S. 577, 584, 599 (1992). The Court stated that this practice was coercive, even though the student had the option to not attend the graduation ceremony, because graduation is an important right of passage that most students would not want to miss. \textit{Id.} at 595.

84. \textit{See Van Orden}, 545 U.S. at 697.


86. \textit{Lee}, 505 U.S. at 640 (Scalia, J., dissenting).

87. \textit{See Van Orden}, 545 U.S. at 694.


89. \textit{See Van Orden}, 545 U.S. 577 at 694-96 (discussing that in order to have these symbols pass constitutional muster, most people attempt to declare these essentially religious symbols as not having religious significance).

90. \textit{See id.} at 697.

91. \textit{See Richard M. Esenberg, You Cannot Lose If You Choose Not to Play: Toward a More Modest Establishment Clause}, 12 ROGER WILLIAMS U. L. REV. 1, 63 (2006) (suggesting that it is "better to abandon the charade that everyone's discomfort can be avoided").

92. \textit{Id.} at 61-62.
E. Van Orden v. Perry: History and Nature of the Monument Test

The U.S. Supreme Court stated in its plurality opinion in *Van Orden* that some of the most recent Establishment Clause cases do not apply the *Lemon* test because it is not useful as a definitive test that can be applied in every instance. 93 Rather, the Court concluded that the more helpful approach for a "passive monument" 94 would be to analyze the "nature of the monument and . . . [the] Nation's history." 95 In doing so, the Court must look to both the past and present, deciding whether a religiously significant monument has a place in the history of our nation. 96 As long as the monument is passive 97 and does not have a "plainly religious purpose," it should not be removed. 98 The underlying reasoning for this is that both God and religion have played a significant role in our Nation's history, and the Court does not want to "evince a hostility to religion by disabling the government from in some ways recognizing our religious heritage." 99 However, the Court must be cautious in using this test to ensure that, in welcoming religion, the government does not subsequently force religion upon those who do not believe in it. 100

F. Summary of the Court's Approach

Overall, the U.S. Supreme Court has had an inconsistent approach to past Establishment Clause cases. 101 This is evidenced by the fact that the Court used two different controlling tests for *Van Orden* and *McCreary*, which were companion cases decided on the same day. 102 Of the many tests the Court has articulated, it has not established one as the controlling test. 103 "Every new case accepted for argument presents the very real possibility that the Court might totally abandon its previous
efforts and start over."104 As a result, one can only speculate as to whether the court will find that the display at issue violates the Establishment Clause, especially since it is equally unclear which test will be used to evaluate the alleged violation.105

IV. THE COURT’S OVERALL APPROACH TOWARDS CROSSES

With no definitive rule in place, the lower courts have had an inconsistent approach towards Establishment Clause violations involving crosses.106 However, despite this inconsistency, these courts have provided some structure. Several key principles demonstrating when crosses do and do not violate the Establishment Clause have emerged from the various cases that have been decided by the federal courts and the United States Supreme Court.107

A. Examples of When Crosses Have Violated the Establishment Clause

The federal courts have heard many Establishment Clause cases involving crosses.108 Quite often, the courts hold that the cross at issue violates the Establishment Clause.109 A clear violation has been found in four situations.110 Two such situations are when the cross is the main feature of the display without any surrounding elements and when the cross is erected with a primarily religious purpose.111 Crosses also violate the Establishment Clause when the government plays a major

104.  Id.
105.  See LEVY, supra note 14, at 221 ("The Court has reaped the scorn of a confused and aroused public because it has been erratic and unprincipled in its decisions.").
106.  See id. at 220.
107.  See generally Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 763 (1995) (suggesting that as long as both religious and nonreligious groups have access to erect displays in the public area, the cross should not violate the Establishment Clause); ACLU v. Rabun Cnty. Chamber of Commerce, Inc., 698 F.2d 1098, 1111 (11th Cir. 1983) (finding that crosses that do not have a clear secular purpose violate the Establishment Clause); Eugene Sand & Gravel, Inc. v. City of Eugene, 558 P.2d 338, 347 (Or. 1976) (finding that crosses that are sponsored by a secular organization do not violate the Establishment Clause).
108.  Marques, supra note 69, at 855 (suggesting that federal courts frequently encounter these types of cases).
109.  Id.
110.  See Am. Atheists, Inc. v. Duncan, 616 F.3d 1145, 1160 (10th Cir. 2010) (finding that a cross voluntarily violates the Establishment Clause when it is standing alone and not part of a display and surrounded by other symbols); Buono v. Norton, 371 F.3d 543, 550 (9th Cir. 2004), rev’d sub nom. Salazar v. Buono, 130 S. Ct. 1803 (2010) (finding that a cross is a violation when the government is highly involved in maintaining it); Separation of Church & State Comm. v. City of Eugene, 93 F.3d 617, 620 (9th Cir. 1996) (finding a violation solely because the cross is a prominent symbol of Christianity); Rabun Cnty. Chamber of Commerce, 698 F.2d at 1111 (finding that a cross violates the Establishment Clause when it is erected with a religious purpose).
111.  See Duncan, 616 F.3d at 1160; Rabun Cnty. Chamber of Commerce, 698 F.2d at 1111.
part in the creation of the cross display, going to great lengths not only
to erect it, but also to prevent its removal.112 Lastly, in some cases, the
courts have found a violation simply because the display is a cross and
crosses are the preeminent symbol of Christianity.113

The first situation in which the courts have found a violation of the
Establishment Clause is if a cross is erected as the main feature of the
display and is devoid of any secular or diverse religious content.114 In
Duncan, the Tenth Circuit found that if a cross stands alone, with no
secular elements, there is nothing to detract from the religious
message.115 Furthermore, in Carpenter v. City & County of San
Francisco,116 the Ninth Circuit found that when a cross is the only
religious symbol erected, it becomes a prominent display of Christianity,
conveying and endorsing a religious message.117 The Ninth Circuit
analyzed the cross display for a violation of the “No Preference” Clause
of the California Constitution, which uses the exact language of the
Establishment Clause.118 The court found that the cross at issue violated
the “No Preference” Clause because it stood alone and there were no
other religious displays that would help detract from the religious
significance of the cross.119 The Ninth Circuit found it irrelevant that the
cross had been on display since 1934.120 The fact that a cross may stand
uncontested for a long period of time does not eliminate the
religiosity of a symbol standing alone.121 Historical meaning is not
automatically imposed based on the passage of time.122 According to
this court, there has to be something more that occurs, such as the
naming of the cross as a “historical landmark[,]” in order for it to take on
a historical meaning separate from its religious meaning.123

Where, in erecting a cross, the government has a clear religious
purpose, the courts have found a violation of the Establishment


112. See Norton, 371 F.3d at 550.
113. See Separation of Church & State Comm., 93 F.3d at 620.
114. See Duncan, 616 F.3d at 1160; Carpenter v. City & Cnty. of S.F., 93 F.3d 627, 629-30
(9th Cir. 1996) (analysis under the California constitution’s “No Preference” Clause).
115. Duncan, 616 F.3d at 1160.
116. 93 F.3d 627 (9th Cir. 1996).
117. See id. at 630.
118. Id. at 628. Since the “No Preference” Clause of the California constitution uses the exact
language of the Establishment Clause, the facts of this case are useful in the current analysis of the
119. Carpenter, 93 F.3d at 630, 632.
120. Id. at 629, 631.
121. See id. at 631.
122. See id.
123. See id. at 631-32.
Clause.\textsuperscript{124} In that situation, the government is taking a side and promoting not only that specific religion, but also religion over nonreligion.\textsuperscript{125} Thus, the government no longer maintains a neutral position towards religion.\textsuperscript{126} For example, in \textit{ACLU v. Rabun County Chamber of Commerce},\textsuperscript{127} the Eleventh Circuit found that the cross at issue had a religious purpose not only because crosses are a symbol of Christianity, but also because the cross was set to be completed in time for a dedication at the Easter religious services.\textsuperscript{128} This cross clearly was to be used for religious services, rendering its purpose essentially religious.\textsuperscript{129}

Furthermore, the court in \textit{Rabun County Chamber of Commerce} stated that even if a secular purpose had existed, the cross would still violate the Establishment Clause because "a government may not 'employ religious means to reach a secular goal unless secular means are wholly unavailing.'"\textsuperscript{130} Thus, according to the Eleventh Circuit, if there is a secular means of achieving a certain goal, it must be utilized instead of the religious means.\textsuperscript{131} The stronger the connection to religion, the more a court will be inclined to find a violation of the Establishment Clause, even if a secular purpose can be articulated.\textsuperscript{132}

Some courts have also found that crosses violate the Establishment Clause if the government is highly involved in the creation of the cross and tries to protect it from removal.\textsuperscript{133} In \textit{Buono v. Norton},\textsuperscript{134} the Court of Appeals for the Ninth Circuit found that a Latin cross erected in the Mojave Desert violated the Establishment Clause because the government went to great lengths to prevent its removal.\textsuperscript{135} Thus, a reasonable observer, aware of the history of this specific cross, would view it as an endorsement of Christianity.\textsuperscript{136} The Ninth Circuit did not

\textsuperscript{124} See \textit{ACLU v. Rabun Cnty. Chamber of Commerce, Inc.}, 698 F.2d 1098, 1111 (11th Cir. 1983).
\textsuperscript{125} See \textit{McCreary Cnty. v. ACLU}, 545 U.S. 844, 875 (2005).
\textsuperscript{126} See \textit{id}.
\textsuperscript{127} 698 F.2d 1098 (11th Cir. 1983).
\textsuperscript{128} \textit{id.} at 1110-11.
\textsuperscript{129} \textit{id.} at 1111.
\textsuperscript{130} \textit{id.} (quoting \textit{Sch. Dist. of Abington Twp. v. Schemp}, 374 U.S. 203, 294 (1963) (Brennan, J., concurring)).
\textsuperscript{131} \textit{See id}.
\textsuperscript{132} \textit{See id.} (finding that even though there was secular purpose, using religious means to achieve that purpose strengthened the message of endorsement).
\textsuperscript{135} \textit{See id.} at 544, 550.
\textsuperscript{136} \textit{See id.} at 550 (citation omitted).
find the fact that the cross was erected in the desert, a remote location, to be determinative.\textsuperscript{137} Even though the cross was not erected near any governmental structures, the religiousness of the symbol was not minimized.\textsuperscript{138} While it is important to note that the U.S. Supreme Court reversed this decision in \textit{Salazar v. Buono},\textsuperscript{139} the Court’s opinion in \textit{Salazar} focused solely on the validity of a land transfer statute, and not whether the cross could be perceived as an endorsement of Christianity.\textsuperscript{140} Thus, the Ninth Circuit’s argument is still a valid viewpoint regarding how crosses can violate the Establishment Clause and is relevant to this overall discussion.\textsuperscript{141}

Lastly, cross displays have violated the Establishment Clause in some instances solely because the cross is a prominent symbol of Christianity.\textsuperscript{142} In \textit{Separation of Church & State Committee v. City of Eugene},\textsuperscript{143} the Court of Appeals for the Ninth Circuit found that a fifty-foot Latin cross violated the Establishment Clause because the Latin cross is a symbol of Christianity and could be recognized as government endorsement of Christianity.\textsuperscript{144} Similarly, the Ninth Circuit took the same position in its decision in \textit{Norton}. The court found that the cross display violated the Establishment Clause because it would convey an endorsement of religion to the reasonable observer precisely because the cross is a Christian symbol.\textsuperscript{145}

\begin{thebibliography}{9}
\bibitem{137} Id. at 549.
\bibitem{138} Id.
\bibitem{139} 130 S. Ct. 1803 (2010).
\bibitem{140} See \textit{The Supreme Court, 2009 Term — Leading Cases}, 124 \textit{Harv. L. Rev.} 179, 219-22 (2010). After a permanent injunction enjoining the display of the cross was affirmed in \textit{Norton}, Congress passed a defense appropriations bill that would transfer the ownership of the land the cross was mounted on to the Veterans of Foreign Wars. Id. at 221. Thus, the cross would no longer stand on public land, as an endorsement of the Christian religion. See \textit{id}. The Court’s opinion in \textit{Salazar} analyzed the land transfer, holding that a prior injunction enjoining the land transfer statute be reversed. \textit{Id.} at 222. The Court focused its analysis on why the land transfer should be valid, and even suggested that the cross would no longer be subject to the Endorsement test now that the land was owned by a private entity. \textit{Id.} at 222-23.
\bibitem{141} See \textit{id.} at 222 (stating that the Court in \textit{Salazar} focused its attention on the validity of a land transfer statute).
\bibitem{142} See \textit{Separation of Church & State Comm. v. City of Eugene}, 93 F.3d 617, 620 (9th Cir. 1996).
\bibitem{143} 93 F.3d 617 (9th Cir. 1996).
\bibitem{144} See \textit{id.} at 618, 620.
\end{thebibliography}
In cases where no violation was found, the courts have been cautious in their approach, upholding crosses as permissible under the Establishment Clause only under certain limited circumstances. Crosses do not violate the Establishment Clause in three situations. Crosses have been permitted to remain standing if they have an unequivocal secular purpose, such as to memorialize the deceased, or if they are sponsored or funded by a secular organization. Additionally, cross displays do not violate the Establishment Clause if all religions have equal access to the area in which the display is mounted.

Crosses that have a clear secular purpose do not violate the Establishment Clause. Such a purpose detracts from the religious message of the display, leading the reasonable observer to believe the cross is not endorsing the Christian religion. For example, in Eugene Sand & Gravel, Inc. v. City of Eugene, the Supreme Court of Oregon set aside a decree it had previously issued holding that a large cross in a municipal park violated the Establishment Clause. That court concluded that, due to changed circumstances, the cross no longer violated the Establishment Clause when evaluated under the Lemon test. The court found that the cross now had a secular purpose because the voters of the city passed a charter amendment making the cross a memorial to U.S. war veterans. A public ceremony officially dedicated the cross to these veterans, and the citizens now accept this cross as a permanent war memorial. Thus, it has a clear secular purpose.

See generally Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 763 (1995) (finding the cross did not violate the Establishment Clause because the area in which it was erected was accessible for all); Paul v. Dade Cnty., 202 So. 2d 833, 835 (Fla. Dist. Ct. App. 1967) (suggesting that crosses that have a clear secular purpose should be allowed to remain standing); Eugene Sand & Gravel, Inc. v. City of Eugene, 558 P.2d 338, 347 (Or. 1976) (finding that a cross funded by a secular organization did not violate the Establishment Clause).

146. See generally Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 763 (1995) (finding the cross did not violate the Establishment Clause because the area in which it was erected was accessible for all); Paul v. Dade Cnty., 202 So. 2d 833, 835 (Fla. Dist. Ct. App. 1967) (suggesting that crosses that have a clear secular purpose should be allowed to remain standing); Eugene Sand & Gravel, Inc. v. City of Eugene, 558 P.2d 338, 347 (Or. 1976) (finding that a cross funded by a secular organization did not violate the Establishment Clause).

147. See Pinette, 515 U.S. at 763; Paul, 202 So. 2d at 835; Eugene Sand & Gravel, Inc., 558 P.2d at 347.

148. See Paul, 202 So. 2d at 835; Eugene Sand & Gravel, Inc., 558 P.2d at 347.

149. See Pinette, 515 U.S. at 763.

150. See Eugene Sand & Gravel, Inc., 558 P.2d at 346.

151. See id.

152. 558 P.2d 338 (Or. 1976).

153. See id. at 349.

154. See id.

155. See id. at 340, 347.

156. See id.

157. See id.
purpose, and no longer conveys the message of religious endorsement that it previously had.\textsuperscript{158}

Similarly, in \textit{Paul v. Dade County},\textsuperscript{159} the Court of Appeals for the Third District of Florida found that a string of lights in the shape of a cross placed on the Dade County Courthouse did not violate the Establishment Clause.\textsuperscript{160} In this instance, the cross did not violate the Establishment Clause because it was not initially erected with the purpose of advancing religion.\textsuperscript{161} The string of lights in the shape of a cross was erected to decorate the streets for Christmas, intending to bring more shoppers into the area.\textsuperscript{162} The court focused on the fact that the cross display did not "promote the participation by anyone in the affairs of any religious organizations or sect."\textsuperscript{163}

Furthermore, cross displays do not violate the Establishment Clause when they are funded and maintained by a secular organization, keeping the government from being directly involved.\textsuperscript{164} In \textit{Eugene Sand & Gravel, Inc.}, the court noted that a key fact in its determination was that the city was not involved in the planning or organization of the display of the cross.\textsuperscript{165} The court explained that the secular message conveyed by the cross is strengthened by the fact that the display was sponsored by a secular organization.\textsuperscript{166} These facts kept the cross at issue from becoming unnecessarily intertwined with the government, thus preventing it from endorsing the Christian religion.\textsuperscript{167} Likewise, the \textit{Paul} Court found it important that absolutely no public funds were used, or would be used in the future, to maintain the cross erected on the Dade County Courthouse.\textsuperscript{168} The court argued that, by allowing private persons to fund and maintain a cross with a clear secular purpose, the government was not using its own power to organize and manage this

\begin{enumerate}
\item 158. \textit{See id.} at 349.
\item 159. 202 So. 2d 833 (Fla. Dist. Ct. App. 1967).
\item 160. \textit{Id.} at 835.
\item 161. \textit{See id.}
\item 162. \textit{Id.}
\item 163. \textit{Id.}
\item 164. \textit{See Eugene Sand & Gravel, Inc. v. City of Eugene, 558 P.2d 338, 347 (Or. 1976); see also Paul, 202 So. 2d at 835.}
\item 165. 558 P.2d at 347.
\item 166. \textit{See id.}
\item 167. \textit{Id.}
\item 168. \textit{See Paul, 202 So. 2d at 835. Cf. Eugene Sand & Gravel, Inc., 558 P.2d at 347 (stating that the excessive entanglement "requirement is not violated by the fact of payment by the government for maintenance of the display of a religious 'symbol,' although the requirement is violated if the government participates in an active manner in the planning and organization of activities which involve such a display").}
\end{enumerate}
Thus, there could be no conclusion that the State was endorsing the Christian religion because it was not using its money "to support, aid, maintain[,] or establish any religion or religious edifices." If the public place in which the cross is erected permits a variety of groups to use the space, the cross does not violate the Establishment Clause. In *Capitol Square Review & Advisory Board v. Pinette,* the Supreme Court held that a cross erected by the Ku Klux Klan in a public plaza next to the statehouse did not violate the Establishment Clause. Neutrality was the touchstone of the Court's inquiry. The Court focused on the fact that in the past other religions had been permitted to erect displays of their choosing in the public plaza. While the Court viewed this as a public forum for private expression in which the Free Speech Clause would govern, it still analyzed this cross under the Establishment Clause. The determinative factor in *Pinette* was that all private groups were granted the same access to the park for the purpose of erecting a display. The application process was equal for each private group seeking to use that space. The Court found that the government does not endorse religion by permitting its access to a forum to which all other nonreligious displays have access. It further stated that in the current Establishment Clause precedent, the Court has never held it unconstitutional to enact policies that may have an incidental effect of benefiting religion, as long as those policies are neutral to the population as a whole. Thus, there is no Establishment Clause violation as long as equal access to the public space is granted to all.

V. CROSSES USED AS ROADSIDE MEMORIALS DO NOT VIOLATE THE ESTABLISHMENT CLAUSE

In the most recent court case involving crosses erected as roadside memorials, the Court of Appeals for the Tenth Circuit held that the
memorial at issue violated the Establishment Clause. In American Atheists, Inc. v. Duncan, the court found that crosses erected as roadside memorials for fallen highway patrol officers violated the Establishment Clause. The Utah Highway Patrol Association ("UHPA"), a non-profit organization, wanted to memorialize officers who had passed away while on duty for the Utah Highway Patrol ("UHP"). After much thought, the UHPA felt the best way to achieve this purpose was to erect "twelve-foot high crosses [which contained] [t]he fallen trooper's name, rank, and badge number . . . [as well as] the UHP's official 'beehive' symbol[,] . . . the year the trooper died[,] and a small plaque containing a picture of the trooper and some biographical information." The UHPA stated that these memorials were to serve as a reminder that an officer gave his life while on duty trying to keep the public safe, to praise the officer, and to encourage the public to continue driving safely while on the highway. The UHPA felt that the easiest and quickest way to convey these messages to the public driving past the memorials at high speeds on the highway was by erecting crosses. The UHPA even obtained permission from the officers' families to use a cross as the prominent symbol of the memorial. After mounting the first cross in 1998 on private property, the UHPA sought and was granted permission by the State of Utah to assemble more crosses on public property. In total, the UHPA mounted thirteen crosses, some located on private land and others on public land. The crosses were funded privately and maintained by the UHPA.

The American Atheists organization brought suit against the state employees who approved the mounting of the crosses on public land, alleging that the crosses violated the Establishment Clause. The Tenth Circuit analyzed these crosses under the Lemon test and found that there was indeed a violation of the Establishment Clause. While there was a secular purpose in erecting the crosses, the Court found that they had the

182. Am. Atheists, Inc. v. Duncan, 616 F.3d 1145, 1164 (10th Cir. 2010).
183. 616 F.3d 1145 (10th Cir. 2010).
184. Id. at 1150.
185. Id.
186. Id. at 1150-51.
187. Id. at 1150.
188. Id. at 1150-51.
189. Id. at 1151.
190. Id.
191. Id.
192. Id.
193. Id. at 1151-52.
194. Id. at 1156-61, 1164.
primary effect of supporting Christianity.\textsuperscript{195} A cross is the predominant symbol of Christianity and “can only be allowed if [its] context or history avoid the conveyance of a message of governmental endorsement of religion.”\textsuperscript{196} The Duncan Court found that in the context in which these cross memorials were used, there was the clear message of endorsement.\textsuperscript{197} The crosses stood alone, with no other displays to help secularize them.\textsuperscript{198} The UHPA mounted the majority of the crosses on public land, and they bore the UHP’s insignia.\textsuperscript{199} Moreover, other symbols were available to memorialize the officers instead of a cross.\textsuperscript{200} The court found that all of these factors could lead a reasonable observer to believe that the state was endorsing Christianity.\textsuperscript{201}

The Tenth Circuit in Duncan interpreted the Establishment Clause too narrowly.\textsuperscript{202} Crosses, when used as roadside memorials, should not violate the Establishment Clause.\textsuperscript{203} Crosses that are used in this context satisfy the criteria of each of the tests the U.S. Supreme Court has proposed in approaching Establishment Clause challenges.\textsuperscript{204}

\textbf{A. Roadside Crosses Satisfy the Three Prongs of the Lemon Test}

CROSSES as roadside memorials do not violate the Establishment Clause when evaluated under the Lemon test.\textsuperscript{205} First, there is a secular purpose in erecting these crosses because they are used to portray a symbol of death.\textsuperscript{206} Therefore, they do not stand for the alternative

\begin{itemize}
\item \textsuperscript{195} Id. at 1157, 1161.
\item \textsuperscript{196} Id. at 1160.
\item \textsuperscript{197} Id.
\item \textsuperscript{198} Id.
\item \textsuperscript{199} Id.
\item \textsuperscript{200} See id. at 1161 (stating that “the military provides soldiers and their families with a number of different religious symbols that they may use on government-issued headstones or markers”).
\item \textsuperscript{201} Id. at 1150.
\item \textsuperscript{202} See Salazar v. Buono, 130 S. Ct. 1803, 1818 (2010).
\item \textsuperscript{203} Id.
\item \textsuperscript{204} See supra Part III.A (discussing the Lemon test). See generally Salazar, 130 S. Ct. at 1818 (suggesting that a cross on the side of a highway memorializing a highway trooper does not need to be viewed as government support of religion).
\item \textsuperscript{205} See generally Salazar, 130 S. Ct. at 1820 (stating that the primary effect is that of a memorial because the cross is not just a symbol of Christianity, it is also a symbol of death); Duncan, 616 F.3d at 1157-58 (suggesting that as long as the cross has the purpose of being a memorial, it satisfies the first prong of the Lemon test); Eugene Sand & Gravel, Inc. v. City of Eugene, 558 P.2d 338, 347 (Or. 1976) (finding that a cross that is created and maintained by a private party does not violate the third prong of the Lemon test).
\item \textsuperscript{206} See Matthew Carberry, Comment to Cross Memorials on Government Land, THE VOLOKH CONSPIRACY (Apr. 23, 2010, 4:38 PM), http://volokh.com/2010/04/23/cross-memorials-on-government-land/ (suggesting that if the primary purpose of the cross is to be a memorial, then the shape of the cross should be secondary).
\end{itemize}
symbol of Christianity. Crosses, when used as roadside memorials, are genuine expressions of grief by the deceased’s loved ones, and serve the purpose of helping them navigate through the grieving process. In Duncan, the Tenth Circuit found it straightforward that as long as the crosses were erected with the purpose of memorializing the deceased, a secular purpose can be found. Thus, when a cross is erected as a roadside memorial, its primary purpose is secular in that it serves as a memorial; it is not primarily erected in order to advance the Christian religion. When the cross has this unequivocal secular purpose, just as a roadside cross does, some lower courts have found that the government cannot be viewed as allowing the cross to remain standing with the purpose of promoting a religion.

Second, given that crosses are widely used in the context of roadside memorials, the primary effect is not the endorsement of religion. The results of a survey mailed to the Director of Transport in each of the fifty states showed that “the cross is a dominant feature of most roadside memorials” and “is typically the memorial when a religious symbol is displayed.” Additionally, to highlight how widespread this practice is, one business, called “Roadside Memorials,” sold several hundred crosses to be used as roadside memorials. While it is true that crosses are widely used because the majority of people who construct roadside memorials are Christian, it has been found that these crosses are rarely erected as an expression of religion. Many have articulated that they chose the cross because of a cultural custom of using crosses to honor the dead. Thus, this widespread use can be attributed to the fact that crosses have become “a cross-cultural symbol of death.” This cultural custom creates a primary effect of memorializing the dead.

207. See id.
208. See Melissa Villanueva, “Resting Places” Documentary clip 1, YOUTUBE (May 22, 2009), http://www.youtube.com/watch?v=Kmy8zfkdHAY.
209. See Duncan, 616 F.3d at 1157.
210. See id.
213. Id. at 157.
214. Id. at 164.
216. See Dickinson & Hoffmann, supra note 212, at 164.
217. Id.
218. Id.
219. See id.
The fact that the cross is not a universal symbol of death for all religious and nonreligious people, but is a Christian symbol of death, does not diminish the primary effect of memorializing the deceased.220 There is no question that a cross is the paramount symbol of Christianity and is used primarily by Christians as a memorial.221 This leaves the possibility that the memorial could be perceived as a governmental endorsement of Christianity.222 However, in the plurality opinion in Salazar, Justice Kennedy stated that even though the cross is a symbol of Christianity, it is not merely just that.

The cross "is a symbol often used to honor and respect those whose heroic acts, noble contributions, and patient striving help secure an honored place in history for this Nation and its people."223 In his concurrence, Justice Alito even suggested that the removal of the cross at issue in the case would be viewed by many as disrespectful towards the soldiers whom the cross memorialized.225 The cross itself is a public act of grieving and serves as a "physical marker of memory."226 The fact that the cross is so widely used as a memorial and is known as a symbol marking the memory of those who have passed, ensures that the primary message conveyed to the observer is that a person has passed away.227 Its effect is that it honors the deceased, not that the government is endorsing the Christian religion.228

Finally, excessive entanglement with the government does not exist because the private party, not the government, maintains how the cross will be displayed.229 In Lemon, the Supreme Court stated that in looking at the entanglement prong, the court must scrutinize "the resulting relationship between the government and the religious authority."230 In Eugene Sand & Gravel, Inc., the Oregon Supreme Court stated that

221. See Am. Atheists, Inc. v. Duncan, 616 F.3d 1145, 1161 (10th Cir. 2010).
222. See id.; Separation of Church & State Comm. v. City of Eugene, 93 F.3d 617, 620 (9th Cir. 1996) (stating that "[t]here is no question that the Latin cross is a symbol of Christianity" and it "may reasonably be perceived as governmental endorsement of Christianity").
223. Salazar, 130 S. Ct. 1820.
224. Id.
225. See id. at 1822-23 (Alito, J., concurring).
227. See Salazar, 130 S. Ct. at 1820 (majority opinion); see also Dickinson & Hoffmann, supra note 212, at 164.
228. See Salazar, 130 S. Ct. at 1820.
excessive entanglement exists when the government is actively involved in “the planning or organization of any activities which involve the display.” In that instance, the court even went so far as to conclude that the entanglement prong is not violated even if the government pays for the maintenance of the cross. As the government intertwines itself with the cross, it runs the risk of creating the image of endorsement that the lower courts shy away from. In the case of a roadside memorial, however, the private party who wants to memorialize its loved one erects the cross memorial and maintains it. This private party may be a secular organization or an individual. No matter which it is, the courts have authorized these groups to maintain a cross memorial because it does not result in a relationship of entanglement between the government and the religious symbol.

B. Roadside Crosses Do Not Convey A Message of Endorsement to A Reasonable Informed Observer

Crosses as roadside memorials do not violate the Establishment Clause when evaluated under the Endorsement test. The reasonable observer is required to have knowledge of the important background history of the symbol at issue. A reasonable observer in this context would know that the main reason for the use of a cross is not for the endorsement or disapproval of a specific religion. Rather, the cross is erected in order to memorialize a life that is now lost. This practice of erecting a cross at the site of a highway death originated from the

232. See id.
233. See id.
234. See Andrew O'Connor, Roadside crosses a stark reminder, ABC NEWS, http://www.abc.net.au/news/stories/2010/08/12/2980974.htm (stating that it is usually the family and friends of the deceased person who erect these memorials) (last updated Aug. 12, 2010).
235. See, e.g., Am. Atheists, Inc. v. Duncan, 616 F.3d 1145, 1150 (10th Cir. 2010) (stating that a secular organization erected the crosses at issue); Stepzinski, supra note 1 (stating that the daughter of the deceased erected a cross that will be removed in the future by the Georgia Department of Transportation).
236. See Eugene Sand & Gravel, Inc., 558 P.2d at 347 (finding no entanglement when private party maintained the cross and organized activities involving it).
239. See Dickinson & Hoffmann, supra note 212, at 164.
240. See id. at 162.
Hispanic culture in the Southwest. In New Mexico, when a person passed away, the funeral procession would carry the coffin while walking to the burial site. Every time a break was taken, a memorial would be erected in the spot where the people carrying the coffin stopped to rest. These memorials were usually two branches in the form of a cross and were called Descansos. As cars became more widely used, and the rate of fatal car accidents grew, this practice spread to the highways and the crosses were mounted at the scene of deadly accidents. A reasonable observer who is aware of this backdrop would understand that the use of roadside memorials is a practice with deep historical roots, and is in no way intended to serve as an endorsement of the Christian religion.

Furthermore, the reasonable observer would know that crosses are often used as memorials. Private parties erect crosses as roadside memorials to honor those who have passed away. The message conveyed by these crosses is “remember those who have died” instead of remember the Christian religion. Thus, the message perceived by the reasonable observer would be one of death and memory instead of religious endorsement. Additionally, a reasonable observer may also view these crosses as a reminder of the great possibility for danger while driving. These roadside crosses raise recognition among the public of how common fatal car accidents are. Therefore, a reasonable observer will also be reminded of “humanity and mortality,” rather than feel alienated by the government for its religious preference.

In Duncan, the Court of Appeals for the Tenth Circuit found that the crosses at issue violated the Establishment Clause because they stood alone with no other secular symbols, were adorned with a government
emblem, and were large in size.\textsuperscript{254} The court stated that these factors could convey a message of endorsement of the Christian religion to a reasonable observer.\textsuperscript{255} While the courts have been more inclined to find a violation when the cross display lacks any secular elements, this does not rule out crosses used as roadside memorials.\textsuperscript{256} When a cross is erected as a roadside memorial, it has the secular purpose of conveying the message of memory.\textsuperscript{257} There does not need to be anything else present to secularize it because, in this special context, the cross itself is functioning in a secular capacity.\textsuperscript{258} It no longer becomes a symbol of Christianity, but a symbol of death and respect for the deceased person it honors.\textsuperscript{259}

When the government puts its own emblem on the cross, a perceived connection of the government to the cross is more likely to surface.\textsuperscript{260} A reasonable observer might be more inclined to view it as a government endorsement of the Christian religion, fearing that Christians will receive preferential treatment from the government.\textsuperscript{261} However, the reasonable observer, who is the guiding measure for the Endorsement test analysis, is supposed to have knowledge of the history of the memorial.\textsuperscript{262} An observer of a cross memorial that bears a government symbol would be conscious of the fact that the cross is memorializing a deceased public officer.\textsuperscript{263} If the reasonable observer considers this fact, he or she would know that the government emblem is featured on the cross to promote awareness that an officer passed away while protecting the public.\textsuperscript{264} The cross then becomes a tribute to those who give their lives to protect others, and the reasonable observer would be less prone to believe that the cross is endorsing the Christian religion.\textsuperscript{265}

\textsuperscript{254} Am. Atheists, Inc. v. Duncan, 616 F.3d 1145, 1162 (10th Cir. 2010).
\textsuperscript{255} Id. at 1160.
\textsuperscript{256} See id. at 1162.
\textsuperscript{257} See Stepzinski, supra note 1.
\textsuperscript{260} See Duncan, 616 F.3d at 1160.
\textsuperscript{261} See id.
\textsuperscript{263} Travers, supra note 237 (stating that the message perceived by a cross should be to remember the deceased).
\textsuperscript{264} See Pinette, 515 U.S. at 780-81 (suggesting that the reasonable observer considers all of the history as well as the context of the cross display).
\textsuperscript{265} See Travers, supra note 237; see also Salazar v. Buono, 130 S. Ct. 1803, 1820 (2010).
The size of the cross also plays a role in whether a reasonable observer is likely to view the memorial as a government endorsement of Christianity. The bigger the cross, the more likely a reasonable observer will feel the government is favoring the Christian religion. A large cross, however, would not necessarily lead to the conclusion that a cross, used as a roadside memorial, automatically violates the Establishment Clause. A reasonable observer would be aware of the fact that the cross may be large because the private party who erected it wanted to ensure others would see it. When a party erects a cross as a memorial, it does not only serve as a place for loved ones of the deceased to go to for help in their grieving process. It is also a way for those loved ones to make the public aware of their loss, sending their message that someone significant passed away. Therefore, a "reasonable, informed observer[,]" aware of this message, would not believe that the cross is endorsing the Christian religion.

Some argue that "cemeteries [are] for mourning and reflection. Highways belong to the [p]ublic." Thus, these memorials are not necessary to aid in the grieving process, and the potential for endorsement outweighs the benefit that loved ones receive from erecting these crosses as memorials. However, while cemeteries may provide an outlet for grieving family members, the roadside memorial is a personalized spot that they can go to in order to remember their loved one. As one mother stated about the roadside memorial for her twenty-one-year-old daughter, "[e]very week I would go and place fresh flowers there and sit, cry, scream, vent, whatever I needed to do at the time[.]" These memorials help the deceased's loved ones to grieve

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266. See Duncan, 616 F.3d at 1162.
267. See id.
268. See generally Pinette, 515 U.S. at 780-81 (stating that the reasonable observer is aware of the reason for the existence of the cross); Whitman, supra note 251 (explaining that families erect roadside memorials so that they can convey an important message of safety to drivers on the highway).
269. See Pinette, 515 U.S. at 780-81.
270. See Stepzinski, supra note 1; Whitman, supra note 251.
271. See Stepzinski, supra note 1.
272. Pinette, 515 U.S. at 773.
273. See id. at 779-80.
275. See id. (suggesting that roadside memorials do not help in the grieving process and are just a nuisance since cemeteries provide a place to mourn).
276. See Stepzinski, supra note 1.
277. Id.
and heal from their loss.\textsuperscript{278} They are the last spot that the deceased was alive, and are places where those who are left behind can go to feel close to them again.\textsuperscript{279} Additionally, in some cases, the family may live far from the cemetery where the deceased is buried.\textsuperscript{280} This makes it difficult for the family and friends to visit the deceased when they feel the need to.\textsuperscript{281} Sometimes, the roadside memorial is all that the family has left to help remember its loved one.\textsuperscript{282} These roadside memorials play a special part in the grieving process that a cemetery may not be able to do.\textsuperscript{283} The reasonable observer, considering the healing power of these memorials, would therefore believe that they are not meant to endorse the Christian religion.\textsuperscript{284}

\section*{C. The Practice of Erecting Roadside Cross Memorials is Neutral Towards All Religions}

Crosses as roadside memorials also do not violate the Establishment Clause when evaluated under the \textit{McCreary} Neutrality test.\textsuperscript{285} The government does not favor one side over another when allowing a private party to erect a cross as a roadside memorial.\textsuperscript{286} As long as the government does not initiate the creation of the memorial, determine its religious content, or later control it in any way, it remains neutral toward the display.\textsuperscript{287} In allowing the memorial to be erected, the government assists the deceased’s family and friends in their grieving process.\textsuperscript{288} It is a result of the family and friends’ own independent

\begin{thebibliography}{9}
\bibitem{278} See Harrop, \textit{supra} note 4; O’Connor, \textit{supra} note 234.
\bibitem{279} See Harrop, \textit{supra} note 4.
\bibitem{280} See id.
\bibitem{281} See id.
\bibitem{282} See id.
\bibitem{283} See id.
\bibitem{284} See generally id. (reiterating how these memorials help the families to feel better and heal).
\bibitem{286} See Dave, \textit{supra} note 285.
\bibitem{287} See Eugene Sand & Gravel, Inc. v. City of Eugene, 558 P.2d 338, 347 (Or. 1976) (suggesting that the government did not become entangled with the cross at issue because it was not involved in the creation or maintenance of the memorial; thus, the government remained neutral towards the display).
\bibitem{288} See Harrop, \textit{supra} note 4.
\end{thebibliography}
choice that they take advantage of this assistance and erect a cross to memorialize their loved one.289

Furthermore, the Supreme Court has stated that cross displays do not violate the Establishment Clause when the public space allows various groups to erect a display of their choosing.290 When the government allows alternative symbols—even alternative religious symbols—to be erected along the public roads, it remains neutral to the entire population.291 The government neither limits which groups are allowed to erect roadside memorials, nor does it only allow religious symbols over non-religious ones.292 The cross is not the only symbol allowed, and therefore, a variety of symbols, whether secular or religious, is used in memorializing the deceased.293 There is no preference for one type of memorial over another—all are allowed. Thus, the government remains neutral when allowing loved ones to erect a memorial cross.294

D. Roadside Cross Memorials Do Not Coerce the Public to Observe the Christian Religion

Moreover, crosses as roadside memorials do not violate the Coercion test as articulated by Justice Thomas.295 The government is not forcing anyone to accept a religion, believe in that specific religion, or even expend money on it.296 A cross memorial is different from a law passed with the intent of obligating the public to do something affirmative.297 A passive symbol does not impose a duty on the public to

289. See id. (suggesting that roadside memorials are usually put up by the friends and family independently of the government); Stepzinski, supra note 1.
291. See id. at 763-64; see also Leslie C. Griffin, Fighting the New Wars of Religion: The Need for a Tolerant First Amendment, 62 ME. L. REV. 23, 70-71 (2010) (stating that allowing a variety of religious monuments to be erected reflects the tolerance of all religions and does not violate the Establishment Clause).
292. See Urbina, supra note 3, at A19 (stating that there is "no federal law governing the placement of" roadside memorials).
293. See Harrop, supra note 4 (describing different symbols that are used).
294. See id.; see also Gordon Dickson, Despite Utah ruling, Texas roadside memorial crosses are still legal, STAR-TELEGRAM (Aug. 20, 2010), http://www.star-telegram.com/2010/08/20/2416463/despite-utah-ruling-texas-roadside.html (suggesting that allowing any religion to erect a memorial for a loved one does not violate the Constitution).
295. See supra Part III.D (discussing Justice Thomas’s Coercion test). See generally Cnty. of Allegheny v. ACLU, 492 U.S. 573, 664 (1989) (Kennedy, J., concurring) (suggesting that passive displays can easily be ignored and walked away from); Dave, supra note 285 (stating that cross memorials do not impose any obligations on the general public).
296. See Dave, supra note 285.
297. See id.
observe the Christian religion. Furthermore, "[p]assersby who disagree with the message conveyed by these displays are free to ignore them, or even to turn their backs, just as they are free to do when they disagree with any other form of government speech." While the observer may be a "‘captive’ audience," finding it hard to avoid looking at the cross memorial, the government does not seek to force the public to observe these memorials. If the driver so chooses, he or she can ignore the cross memorial’s presence, without governmental or legal consequences. Roadside cross memorials do not compel the public to adhere to specific principles or even to acknowledge its presence on the side of the road; therefore, there is no coercion on the part of the government.

E. Roadside Crosses Have a Deep Secular History

Lastly, crosses as roadside memorials do not violate the Establishment Clause when evaluated under the Van Orden History and Nature of the Monument test. The history of how roadside cross memorials originated from the Descansos shows that there is a nonreligious foundation for why these memorials exist today. This secular history weakens the religious message conveyed by cross memorials. Crosses used as roadside memorials also have a secular nature because the deceased’s family and friends erect them with the purpose of memorializing a loved one who has passed away. They are genuine expressions of grief, erected as part of the grieving process. A private party is the one to initiate the creation and assembly of the display—the government merely gives it permission to erect the display in order to help them in the grieving process.

298. See id.
300. Frisby v. Schultz, 487 U.S. 474, 487 (1988) ("The First Amendment permits the government to prohibit offensive speech as intrusive when the 'captive’ audience cannot avoid the objectionable speech.").
301. See Cnty. of Allegheny, 492 U.S. at 664.
302. See Dave, supra note 285.
303. See id.
304. See supra Part.III.E (discussing the Court’s approach in Van Orden). See generally Harrop, supra note 4 (stating that the nature of cross memorials is to aid in the grieving process); ANAYA ET AL., supra note 241 (explaining the history behind cross roadside memorials).
307. See, e.g., Harrop, supra note 4; Stepzinski, supra note 1.
308. See Villanueva, supra note 208.
309. See Am. Atheists, Inc. v. Duncan, 616 F.3d 1145, 1151 (10th Cir. 2010) (finding that the private party, and not the government, initiated the creation of these crosses).
To read the Establishment Clause as prohibiting crosses when used for the secular purpose of a roadside memorial is to read it too strictly. While the government has to be careful not to endorse a specific religion, it still must make an effort to accommodate different religions. Sometimes the government cannot forbid religion from entering the public realm and it has to accommodate a certain religion in a reasonable manner. This is because religion is closely intertwined with the history of man, causing the two at some points to be almost indivisible. If the courts followed a strict interpretation of the Establishment Clause, requiring any public display to be non-religious, there would be a total absence of religion in the public realm. This is a principle that is actually inconsistent with the Constitution. “The goal of avoiding governmental endorsement [of religion] does not require eradication of all religious symbols in the public realm . . . . The Constitution does not oblige [the] government to avoid any public acknowledgment of religion’s role in society.” A policy limiting how people practice their religion is publicly undesirable. Thus, the Establishment Clause does not require suppressing the practice of erecting crosses as roadside memorials.

VI. PROPOSED TEST FOR EVALUATING CROSSES USED AS ROADSIDE MEMORIALS

Crosses, erected as roadside memorials, generally do not violate the Establishment Clause. However, there may be a few instances in
which the message of death is weakened and the message of endorsement strengthened.\textsuperscript{320} To ensure that these situations do not arise, the test that should be applied to roadside memorials would permit the cross to stand as long as it is erected and maintained by a private party,\textsuperscript{321} and the government permits any type of religious or nonreligious displays to be erected as roadside memorials.\textsuperscript{322} The reviewing court should consider these two factors together when analyzing an Establishment Clause claim. When considered together, these factors can help determine if a specific cross, erected as a roadside memorial, conveys a message of endorsement.\textsuperscript{323} The absence of one of these factors should not invalidate a roadside cross memorial, but the absence of both factors would tend to strengthen the message of endorsement, thus creating a violation of the Establishment Clause.

When a private party erects a cross in honor of a deceased loved one, the potential message of endorsement is minimized.\textsuperscript{324} The government is not involved in the creation or maintenance of the cross; thus, it is not endorsing the Christian religion.\textsuperscript{325} The government is merely allowing those who are mourning the loss of a loved one to do so in the way that will help them best.\textsuperscript{326} However, if the government were to take part in the maintenance of the cross, the message perceived could be that the government cares about the survival of the cross; thus, it is no longer remaining neutral towards the display.\textsuperscript{327} For this reason, the source of creation and maintenance of the cross memorial is a factor that must be considered.

In allowing memorials of any type, religious or nonreligious, the government remains neutral to all displays that are erected.\textsuperscript{328} The government cannot be seen as endorsing only the Christian religion if other religions are also permitted to erect their own memorials.\textsuperscript{329} If it were true that the government endorses the religion displayed in the memorial, the government would be seen as supporting all religions, even nonreligion, when various types of memorials are allowed.\textsuperscript{330} It could not be said that the government is establishing a religion if it

\textsuperscript{320} See, e.g., Duncan, 616 F.3d at 1160, 1162.
\textsuperscript{321} See Eugene Sand & Gravel, Inc. v. City of Eugene, 558 P.2d 338, 347 (Or. 1976).
\textsuperscript{323} See id.; Eugene Sand & Gravel, Inc., 558 P.2d at 347.
\textsuperscript{324} See Eugene Sand & Gravel, Inc., 558 P.2d at 347.
\textsuperscript{325} See id.
\textsuperscript{326} See Harrop, supra note 4.
\textsuperscript{327} See Eugene Sand & Gravel, Inc., 558 P.2d at 347.
\textsuperscript{329} See Griffin, supra note 291, at 70-71.
\textsuperscript{330} See id. at 71.
supports people of all religions as well as those who choose not to practice a religion.\textsuperscript{331} As long as private parties may put up memorials reflecting whatever religious or secular elements they choose, the government cannot be said to endorse the Christian religion in particular when a cross is erected as a roadside memorial.\textsuperscript{332}

Considering these factors would be the best approach for a court analyzing a roadside cross memorial. Crosses, used as roadside memorials, already have a secular history\textsuperscript{333} and purpose,\textsuperscript{334} and do not coerce the public to practice a specific religion.\textsuperscript{335} The issues that arise with respect to roadside cross memorials are whether the primary message conveyed is of endorsing religion,\textsuperscript{336} and whether the government is intertwining itself with religion or remaining neutral.\textsuperscript{337} The two-factor test suggested here addresses those issues and requires the removal of the cross only in the rare instance that the government is truly overly involved in the cross's maintenance or is favoring the Christian religion over other religions.\textsuperscript{338}

This proposal strikes the best balance because it does not involve the "reasonable observer," who has the potential of being overly sensitive or insensitive when observing the cross memorial.\textsuperscript{339} Moreover, the Supreme Court in \textit{Pleasant Grove City v. Summum,}\textsuperscript{340} stated that monuments do not usually convey one single message.\textsuperscript{341} There are a variety of messages that could be perceived by different observers of the cross memorial.\textsuperscript{342} The Endorsement test, however, "depends [upon] the existence of a discernible message."\textsuperscript{343} The proposed test does not depend on the existence of one concrete message; rather, it accepts a variety of messages and finds a violation of the Establishment Clause only when the two factors are absent. The analysis

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\textsuperscript{331} See supra note 294 and accompanying text.
\textsuperscript{332} See Pinette, 515 U.S. at 763-64.
\textsuperscript{333} See ANAYA ET AL., supra note 241.
\textsuperscript{334} See Am. Atheists, Inc. v. Duncan, 616 F.3d 1145, 1157 (10th Cir. 2010).
\textsuperscript{335} See Cnty. of Allegheny v. ACLU, 492 U.S. 573, 664 (1989) (Kennedy, J., concurring);
\textsuperscript{336} Dave, supra note 285.
\textsuperscript{337} See Duncan, 616 F.3d at 1160.
\textsuperscript{338} See Pinette, 515 U.S. at 763-64.
\textsuperscript{339} See supra notes 321-22 and accompanying text.
\textsuperscript{339} See supra notes 70-72 and accompanying text.
\textsuperscript{340} 129 S. Ct. 1125 (2009).
\textsuperscript{341} See id. at 1135; see also Lisa Shaw Roy, Pleasant Grove City v. Summum: Monuments, Messages and the Next Establishment Clause, 104 NW. U. L. REV. COLLOQUY 280, 286 (2010), http://www.law.northwestern.edu/journals/lawreview/colloquy/2010/5/LRColl2010n5Roy.pdf (stating that displays do not have one recognizable meaning and can be interpreted differently by different people).
\textsuperscript{342} Roy, supra note 341, at 286.
\textsuperscript{343} Id. at 283.
does not depend on the existence of one concrete message; rather, it accepts the variety of messages, and finds a violation of the Establishment Clause only when the two factors are absent. It is only when these factors are absent that the cross would present a strong message of endorsement that stands out from any other, additional message.

Roadside cross memorials aid in the grieving process, and private parties should be allowed to memorialize their loved ones in the manner of their choosing. This test strikes a balance between respecting the grieving process and ensuring the public does not feel that the government is promoting the Christian religion. By allowing the display of various religious symbols, the government does not engage in the act of preferring one religion over another. Instead, by accepting all symbols, the government conveys acceptance of both religion and nonreligion alike.

VII. CONCLUSION

The Supreme Court has had difficulty articulating when religious displays should and should not violate the Establishment Clause. Despite the confusion and inconsistency surrounding this rule, crosses, when used as roadside memorials, do not violate the Establishment Clause. These memorials are a public act of mourning; they are not erected to promote the Christian religion. Most often, it is the last place the deceased was alive, and is a place that the family can go to feel close to the deceased again. By allowing private parties to erect these memorials, the government does not endorse a specific religion. Rather, the government aids loved ones in their grieving process. To take this outlet for expression away from these families would be a great injustice. Therefore, crosses, used as roadside memorials, should not violate the Establishment Clause as long as the cross is erected and

344. See Harrop, supra note 4; Stepzinski, supra note 1.
345. See Dickson, supra note 294.
346. See supra note 19 and accompanying text.
348. See Harrop, supra note 4; Stepzinski, supra note 1.
349. See supra notes 3-6 and accompanying text.
350. See Dave, supra note 285 (stating that the government does not prefer one religion over another by allowing crosses to stand as roadside memorials).
351. See Harrop, supra note 4; Stepzinski, supra note 1.
maintained by a private party and the government permits various types of religious or nonreligious displays to be erected as a roadside memorial. 352

Elizabeth A. Murphy*

352. See supra notes 321-22 and accompanying text.

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